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By Mail and ECF

The Honorable Kenneth M. Karas
United States District Judge
United States District Court for the
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: Elektra v. Barker
SDNY No. 05 Civ. 7340 (KMK)

Dear Judge Karas:

We write to call to the Court's attention the recent decision of the United States Court of Appeals for the First Circuit, Latin American Music Co., v. Archdiocese of San Juan, --F.3d --, 2007 WL 2326817 (1st Cir. August 16, 2007), which, at pages 23-24 specifically repudiates the argument made by plaintiffs at oral argument that the term "to authorize", in the initial paragraph of 17 USC 106, renders "making available" actionable. Even actual authorization, which plaintiffs, cannot and do not allege, is not infringement. As the First Circuit correctly held, "Mere authorization of an infringing act is an insufficient basis for copyright infringement. *Venegas-Hernandez*, 424 F.3d at 57-58. Infringement depends upon whether an infringing act, such as copying or performing, has occurred. *Id.* at 58-59. Therefore, to prove infringement, a claimant must show "an infringing act after the authorization." *Id.* at 59. The Court reversed and remanded a finding of infringement on the counterclaims due to the District Court's failure to determine whether the counterclaim defendants "had committed infringing acts in addition to authorization".

Respectfully submitted,
/s/

Ray Beckerman (RB8783)

cc: Richard J. Guida, Esq.
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